APPENDIX "A"

Opinion of the Supreme Court of Ohio

THE STATE, EX REL. KING, APPELLANT, *v.* SHANNON, PRESIDING JUDGE, APPELLEE.

170 Ohio State 393

Criminal law—Violation of municipal ordinance prohibiting possession of obscene literature—Conviction and sentence—Affirmance by appellate court—Constitutionality of ordinance not raised in lower court—Prohibition to prevent execution of sentence denied.

(No. 36219—Decided March 16, 1960)

APPEAL from the Court of Appeals of Hamilton County. The facts are stated in the opinion.

Mr. Allen Brown, for appellant.

Mr. James W. Farrell, Jr., city solicitor, and *Mr. Lyle W. Castle*, for appellee.

Per Curiam. This is an action in prohibition instituted in the Court of Appeals for Hamilton County, wherein David King, relator, seeks a writ of prohibition against Raymond E. Shannon, Presiding Judge of the Cincinnati Municipal Court, respondent, to prevent the carrying into execution of the sentence imposed on relator after he was charged, tried and found guilty in the Municipal Court of a violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati. The Court of Appeals dismissed the petition, and the cause is now in this court for determination on an appeal as of right.

Section 901-i3 reads as follows:

> "Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image, cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, cir

cular or writing made up principally of pictures or stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than one hundred ($100) dollars, or imprisoned not more than sixty (60) days, or both."

Relator was sentenced to 60 days in jail and fined $100. He thereupon appealed to the Court of Common Pleas where the judgment below was affirmed. On appeal to the Court of Appeals, the judgment of the Court of Common Pleas was affirmed, and relator then filed a motion to certify the record and an appeal as of right in this court where for the first time the constitutionality of the Cincinnati ordinance under which he was convicted was challenged. His motion to certify was overruled and his appeal as of right dismissed "for the reason that no constitutional question was raised in the lower courts." (169 Ohio St. 107, 157 N. E. [2d] 431.)

It is an established rule of long standing in this state that a constitutional question, either in a civil or criminal action, can not be raised in the Supreme Court unless it was presented and urged in the courts below. *Hoffman* v. *Staley*, 92 Ohio St. 505, 112 N. E. 1084; *Cuthbertson* v. *State*, 106 Ohio St. 658, 140 N. E. 941; *Zimmerman* v. *Morris Plan Bank of Cleveland*, 113 Ohio St. 703, 150 N. E. 920; and *Village of Clarington* v. *Althar*, 122 Ohio St. 608, 174 N. E. 251.

And the general rule is that the "validity of a municipal ordinance can not be questioned on review unless first attacked in the court below." 24 Corpus Juris Secundum, 312, Criminal Law, Section 1676.

Appendix "A"

In this prohibition action, relator contends that Section 901-i3 of the ordinances, not requiring *scienter* and making the commission of an offense thereunder a misdemeanor, is in conflict with Section 2905.34, Revised Code, requiring *scienter* and making the same offense a felony, and is a nullity under the decision of this court in the case of *City of Cleveland* v. *Betts*, 168 Ohio St. 386, 154 N. E. (2d) 917. This contention comes too late. We find ourselves in substantial accord with the "conclusions of law" of the Court of Appeals herein, which states:

> "The statutes of Ohio having conferred jurisdiction on the Municipal Court of Cincinnati to hear violations of ordinances of the city of Cincinnati, Ohio, the said court having assumed such jurisdiction, and having found the relator guilty of a violation of city of Cincinnati ordinance No. 901-i3, and the judgment of the said Municipal Court having been affirmed by the Court of Common Pleas of Hamilton County, Ohio, this Court of Appeals and the Supreme Court of Ohio, which denied the relator his appeal as of right and his motion to certify the record, and only the performance of a ministerial act by the Municipal Court of Cincinnati remaining, this court finds that the writ of prohibition does not lie in this case." Compare *State (ex rel. Devine, Pros. Atty.)* v. *Harter, Judge*, 167 Ohio St. 51, 146 N. E. (2d) 437.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, BELL, HERBERT and PECK, JJ., concur.

APPENDIX "B"

Copy of Entry of Supreme Court of Ohio Affirming Judgment of Court of Appeals of Hamilton County, Ohio

Journal 43, Page 404

THE SUPREME COURT OF THE STATE OF OHIO

No. 36219

The State of Ohio } January Term, A. D. 1960
City of Columbus } To-wit: Wednesday, March 16, 1960

STATE OF OHIO, EX REL. DAVID KING,

Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the Court of Appeals be, and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that appellee recover from the appellant his costs herein expended taxed at $———.

ORDERED, That a special mandate be sent to the Court of Appeals of Hamilton County, to carry this Judgment into Execution.

John W. McMillan, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Appendix "B"

Witness my hand and the seal of said Court this 23rd day of March A. D. 1960.

JOHN W. McMILLAN, *Clerk.*

* * * * * *

Journal 43, page 430. Entered April 13, 1960.

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is denied.

APPENDIX "C"

Cincinnati Municipal Ordinance No. 901-i3: Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image, cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, circular or writing made up principally of pictures or stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than one hundred ($100.00) dollars, or imprisoned not more than sixty (60) days, or both.

Ohio Revised Code, Section 2905.34: No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted

to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both.

APPENDIX "D"

Copy of Notice of Appeal to the Supreme Court of the United States

IN THE

SUPREME COURT OF OHIO

No. 36219

STATE OF OHIO, EX REL. DAVID KING,
Plaintiff-Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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1. Plaintiff-appellant in the within cause does hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Ohio, dated April 13, 1960, denying the application for rehearing of said Court's decision of March 16, 1960, in which said Court affirmed judgment of the Court of Appeals for Hamilton County, Ohio in dismissing the Petition of the Relator who sought a writ of prohibition against the defendant from imposing sentence under conviction of violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati upon the grounds that said ordinance was in violation of the Constitution of the United States.

This appeal is taken pursuant to 28 United States Code Annotated 1257(2) and 28 United States Code Annotated 1257(3). This is an action in prohibition instituted in the

Appendix "D"

Court of Appeals for Hamilton County, Ohio, wherein David King, Relator, sought a writ of prohibition against Raymond E. Shannon, Presiding Judge of the Cincinnati Municipal Court, Respondent, to prevent the carrying into execution of the sentence imposed on Relator after he was charged, tried and found guilty in the Municipal Court of the City of Cincinnati of a violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati. Section 901-i3 reads as follows:

> "Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose, or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image, cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, circular or writing made up principally of pictures or stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than One Hundred ($100.00) Dollars, or imprisoned not more than Sixty (60) days or both."

Relator was charged with mere possession, was found guilty and sentenced to sixty days in jail and fined $100.00. He thereupon appealed to the Court of Common Pleas, where the judgment below was affirmed. On appeal to the Court of Appeals, the judgment of the Court of Common Pleas was affirmed and Relator then filed a motion to certify the record and appeal as of right in the Supreme Court of Ohio, where for the first time then counsel for the Relator raised the Constitutionality of the Cincinnati Ordinance under which he was convicted. The Motion to Certify was overruled and the Appeal of Right was dismissed "for the

reason that no constitutional question was raised in the lower courts." (169 O. S. 107, 157 N. E. 2nd 431.) The Relator then initiated the current action for writ of prohibition and posted stay of execution bond on original sentence, which stay of execution is still in full force and effect. Court of Appeals dismissed the Petition and appeal was taken to the Supreme Court of Ohio. The Supreme Court of Ohio denied the Petition, as above set forth. The Court is petitioned to make any further order with respect to stay of execution bond to be given by said defendant in order to stay execution during the pendency of this appeal.

2. The Court will please prepare a transcript of all proceedings in the Supreme Court of Ohio in this cause, including the full proceeding of all lower courts certified to said Supreme Court, and include, but not limited to in said transcript the following:

Findings of fact and conclusions of law of Court of Appeals of Hamilton County, Ohio.

Notice of appeal and Assignments of Error, Supreme Court of Ohio.

Motion for Rehearing, Supreme Court of Ohio.

All briefs and other notices, motions and documents and entries filed in this cause before this Court.

3. Appellant adopts for his statement of points upon which he intends to rely in his Appeal to the Supreme Court of the United States, the following assignments of error.

(a) The Supreme Court of Ohio, erred in refusing to prohibit the imposition of sentence under conviction under an ordinance which is unconstitutional in the following respect to-wit:

> The omission of the element of scienter from the Municipal Ordinance forbidding the mere possession of obscene books renders the same in viola-

Appendix "D"

tion of the Constitution of the United States, First Amendment.

(b) The refusal of the Supreme Court of Ohio to review the constitutionality of the above ordinance in a proper ancillary proceeding where constitutionality was raised in the Court of original jurisdiction on the grounds that the constitutional question was not raised in the original trial tribunal is a deprivation of defendant's rights without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

(c) By reason of the foregoing points upon which the appellant intends to rely in his appeal to the Supreme Court of the United States, the following questions are presented for appeal.

Is Section 901-i3 of the Code of Ordinances of the City of Cincinnati unconstitutional as an unreasonable constraint upon freedom of speech and press in that it imposes criminal liability for mere unknowing possession of obscene literature?

Is the position of the Supreme Court of Ohio to the effect that if the constitutional question is not raised in the original trial of a criminal action and it is forever barred even if properly raised in the original instance in a proper ancillary proceeding to test the constitutionality and the basic jurisdiction of the Court to act under an unconstitutional ordinance, a violation of due process of law and the Fourteenth Amendment of the United States Constitution?

/s/ ALLEN BROWN

Counsel for Plaintiff-Appellant

RECEIPT OF NOTICE

June 8, 1960

This is to acknowledge receipt of the above Notice of Appeal.

/s/ LYLE W. CASTLE

Counsel for Defendant-Appellee

APPENDIX "E"

IN THE
SUPREME COURT OF OHIO

No. 36219

STATE OF OHIO, ex rel. DAVID KING,

Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

APPLICATION FOR REHEARING

Comes now the appellant and makes application to the Court for rehearing in the within cause, upon the grounds set forth in the following memorandum, which is made a part hereof.

Respectfully submitted,

/s/ ALLEN BROWN,
Allen Brown, Attorney for Plaintiff-Appellant.

MEMORANDUM

The Court in its Per Curiam opinion has not discussed the effect upon the given case of *Smith* v. *California,* 28 U. S. Law Week 4033. This decision, which in effect rendered constitutionally invalid the Cincinnati Ordinance under which the appellant was tried and convicted, was later in time than the original trial and complete appeal of the appellant from the original conviction. It would there-

fore have been impossible for the legal effect of this decision to have been raised in the original trial and appeal unless then counsel for appellant had had clairvoyant powers.

However, a much more fundamental issue is developed by the opinion in this case. The Court first misinterprets the general rule laid down in *24 Corpus Juris Secundum 312* to wit: that the "validity of a municipal ordinance cannot be questioned on review unless first attacked in the Court below." This is a rule of *appellate procedure*. This rule does not and cannot apply in an ancillary proceeding where the *fundamental jurisdiction* of the Court to act is being attacked collaterally because of the basic unconstitutionality of the ordinance which the Court seeks to enforce.

In effect, from the face of its opinion, the Court has not given consideration to the proposition that depriving the appellant of the proper ancillary remedy to test the constitutionality of the ordinance when he has failed to do so in the original appeal, and only because he failed to do so in the original trial, is in itself a deprivation of his rights under due process of law.

The reluctance of appellate courts to consider in the self-same cause, issues not presented to the trial tribunal, is a just and proper position, but this arises basically from the fact that the appellate court is sitting in review of what the lower court did. But the transposition of a rule of review to a rule of determination in an ancillary proceeding where the issue is properly raised and considered by the original trial tribunal, is denying the right of appeal in a direct relationship and a deprivation of rights under the due process of law.

Further, since Courts are derivative of the power under law, the jurisdiction of a court, the legal propriety of its very capacity to act, is always subject to ancillary attack.

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This proposition, in the given case, Ohio has foreclosed and a serious question remains as to whether the Ohio doctrine is in and of itself a violation of due process of law.

Respectfully submitted,

/s/ ALLEN BROWN

Allen Brown
Attorney for Plaintiff-Appellant

Copy mailed to opposing counsel March 28, 1960.

/s/ ALLEN BROWN

Allen Brown